Supreme Court, U.S.
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No. 00-1637

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

v.

HOMER DYE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the lower court properly instructed the jury that it could award damages for fear of cancer in a FELA case if it found that the plaintiffs had sustained asbestos related injuries and that the plaintiffs' fear of developing cancer as a result of their asbestos exposure was reasonable?

Whether joint and several liability applies in FELA cases when the trial court determines that the alleged negligence of multiple tortfeasors resulted in a single, indivisible injury such as occupational pneumoconiosis?

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STATEMENT OF THE CASE

A. Introduction

This litigation involves five retired railway workers who brought FELA (Federal Employers Liability Act) lawsuits for occupational pneumoconiosis against their former employer, the Norfolk and Western Railway Company. These cases do not present a good vehicle for deciding the fear of cancer and apportionment of damages issues raised by the petitioner. Because of the general verdict forms used with the railroad's acquiescence, there is no way of determining how much, if any, of the damages were awarded for fear of cancer. The emotional distress claims presented by the plaintiffs were also much stronger than the railroad alleges.

Only two of the five plaintiffs had non-railroad exposure to asbestos. Even in those cases, the railroad exposure was far from "marginal." One of the plaintiffs with non-railroad exposure, Mellington Wheeler, settled with his non-railroad employer, Novamont, and the verdict against the petitioner was reduced by the amount of that settlement. To have employed *both* a settlement offset and some other means of apportioning damages would have resulted in "double dipping." The injuries suffered, mixed dust pneumoconioses, were properly found by the trial judge to be indivisible, and incapable of rational apportionment on the basis of causation. Even if the lower court had abandoned the doctrine of joint and several liability for multiple tortfeasors whose negligence combine to cause an indivisible injury, there was no evidence presented to establish any fault on the part of the non-railroad employers for purposes of apportioning damages. Thus, these cases present a poor vehicle for deciding apportionment issues.

The conflicts of authority alleged by the railroad are more apparent than real. The cases it cites in support of a "physical manifestation" requirement in emotional distress cases are factually distinguishable and almost all of them predate this Court's opinions in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) [Gottshall] and *Metro-North Commuter RR v. Buckley*, 521 U.S. 424 (1997) [Metro-North]. The cases it cites for apportionment of damages do not involve multiple tortfeasors whose negligence was found by the trial court to cause an indivisible injury, which is the type of injury alleged here.

The holdings of the lower court were correct and consistent with similar rulings in many other jurisdictions. Furthermore, the petition exaggerates the impact of the trial court's rulings, and the importance of West Virginia as a forum for FELA cases, while incorrectly asserting that the Supreme Court of Appeals of West Virginia does not review cases such as these.

B. Occupational Exposure

At trial, all of the plaintiffs testified about their exposure to asbestos and other toxic airborne contaminants, as well as their employer's failure to provide them with breathing protection or warn them about the hazards of exposure to airborne dust. Although the railroad asserts at page 7 of the petition that Mr. "Wheeler testified at trial that he was not aware of having been exposed to asbestos at N&W," that simply is not true. According to Mr. Wheeler's trial testimony, as a fireman and engineer on steam locomotives, he continually rode in cabs where the boiler head was covered with asbestos, and the steam lines were also insulated. Trial Transcript (7/29/98) at 74-84, 113, 149-50. When the

asbestos was bumped, chunks would fall to the floor, creating dust when they hit. *Id.* at 75, 80. If the ride was bumpy, asbestos would fly all over. *Id* at 76. Wind from the open windows would also stir up the dust. *Id* at 78.

Two of the plaintiffs, Mellington Wheeler and Leo Thacker, were exposed to asbestos at non-railroad, as well as railroad jobs. After leaving his railroad employment, Mr. Wheeler worked at a chemical plant from 1961 to 1992. Even the railroad's industrial hygienist did not think that this non-railroad exposure was significant, testifying that he did not see any "meaningful opportunity for [Mr. Wheeler] to have high exposure there sufficient to have caused disease. . . . from asbestos or silica . . ." Trial Transcript (7/31/98) at 125. Subsequent to his railroad employment, Mr. Thacker worked on various new construction projects where he may have had some limited exposure to asbestos, but he testified that his asbestos exposure would have been much greater on the railroad than on his other jobs. Trial Transcript (7/24/98) at 234, 274-75. The railroad did not identify the negligence of any third parties as a defense in its Answers or Amended Answers to the Complaints, nor did it seek to add any third party defendants to these lawsuits, or make any effort to obtain contribution from any third parties. Nor did it put on any evidence to show that the non-railroad employers were negligent.[1]

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1. If petitioner's counsel believed that some ruling by the trial court prevented them from presenting such evidence, they needed to vouch the record to preserve the issue for appellate review. *Finley v. Norfolk and Western Railway Co.*, 540 S.E.2d 144 (W. Va. 1999) (per curiam); *Torrence v. Kusminsky*, 408 S.E.2d 684 (W. Va. 1991).

C. Medical Evidence

At trial, none of the parties called any treating doctors to testify, although both sides relied on medical records from treating physicians and called various expert witnesses to the stand. Dominic Gaziano, M.D., a Board Certified Pulmonologist and NIOSH Certified B-Reader, testified that each of the plaintiffs suffered from a mixed dust pneumoconiosis (including asbestosis and silicosis), that their pneumoconioses had been caused, at least in part, by their occupational exposure to asbestos, silica and other toxic dusts on the railroad and that pneumoconiosis can progress to the point where it renders one a respiratory invalid. Trial Transcript (7/24/98) at 32, 42-43, 46, 50, 56, 57, 63, 187-88. Furthermore, because of their occupational exposure to toxic dusts, the plaintiffs were at greater risk of developing lung cancer (which has a mortality rate of 85-90%) and mesothelioma, a painful, almost invariably fatal cancer of the pleural lining. *Id.* at 53-5. In his opinion, people with occupational exposure to asbestos, silica and coal dust should have real concern about developing cancer. *Id.* at 54.

Arnold Brody, a prominent scientist who studies lung pathology, testified about his research concerning the effects of asbestos fibers on the lung. He opined, among other things, that for non-smokers exposed to asbestos, there is a five-fold increase in the risk of developing lung cancer. Trial Transcript (7/23/98) at 188. Smokers exposed to asbestos have a synergistic risk of developing lung cancer, which means that the risk of developing cancer is multiplicative, rather than additive. Thus, one pack per day smokers exposed to asbestos have a risk of developing lung cancer that is fifty times greater than nonsmokers with no occupational exposure to asbestos. *Id.* at 163, 188.

On cross-examination, Dr. Renn, the defendant's chief medical expert, agreed that asbestos was a mutagen, Trial Transcript (8/18/98) at 25, that all of the plaintiffs were at risk of developing mesothelioma because of their occupational exposure to asbestos, *id.* at 51, that asbestos can cause lung cancer in people with asbestosis, *id.* at 25, Trial Transcript (8/17/98) at 172, and that 30-39% of all people with asbestosis will develop lung cancer. Trial Transcript (8/18/98) at 51.

Ray A. Harron, M.D., a board certified radiologist and NIOSH - certified B-reader, testified that all of the plaintiffs had x-ray changes consistent with asbestosis. Trial Transcript (8/18/98) at 133, 134, 137, 159, 160, 161-64. He also testified that asbestosis was an insidious, progressive, incurable disease, and that exposure to asbestos increased the risk of developing mesothelioma, lung cancer and various gastrointestinal cancers, *Id.* at 163, 164, with a five-fold increase in the incidence of lung cancer. *Id.* at 164.

None of the plaintiffs were current smokers. Two of the plaintiffs, Homer Dye and Jethro Walker, never smoked. Mr. Walker had crackles, a mildly reduced diffusing capacity and mildly reduced lung volumes which are classic signs of asbestosis. Even the defendant's chief medical expert, Dr. Renn, considered Mr. Thacker who smoked for 10 years but quit prior to 1946 to be a "non-smoker". Trial Transcript (8/18/98) at 44. Jack Lambert stopped smoking in 1978, long enough ago that his risk of developing lung cancer as a result of smoking had almost declined to that of a person who had never smoked. *Id* at 44, 49, 50. Mr. Wheeler quit smoking in 1992.

D. Lay Testimony Concerning Physical And Emotional Injuries

The late Mellington Wheeler testified that he suffered from shortness of breath that was getting worse. Trial transcript (7/29/98) at 97. As a result, he gave up hunting, fishing, golfing and officiating high school football games. *Id.* at 98. He was advised to walk for the sake of his heart, but could not because of his breathing problems. *Id.* at 75. He sat in the car while his wife shopped. *Id.* at 99. He was concerned about his future health because of his dust exposure and afraid he would die. *Id.* at 99. He was aware of his increased risks of lung cancer and mesothelioma, and thought about it all the time, including the middle of the night when he could not breathe properly. *Id.* at 100-01.

Jack Lambert's testimony disclosed that he suffers from shortness of breath, considers difficulty breathing to be his most serious health problem, no longer hunts, fishes or mows his lawn, hums in church instead of singing, rests when his wife is in the mall, is not as active as other people his age, is worried and afraid about getting cancer, worries about his shortness of breath, and is concerned about what would happen to his wife, who can't drive, if something happened to him. Trial transcript (7/29/98) at 195-202, 241. He is aware of his increased risk of developing cancer and often talks to his wife about his concerns.

Leo Thacker testified that he is aware of his risk of developing mesothelioma, that his lungs keep him up at night, that he has trouble breathing and going up and down stairs, that he cannot hunt with his grandchildren or walk up hills anymore, that he uses Ventolin and a fog machine, that his family doctor said he had asbestosis, that he is concerned

about his future health and about his wife, children and grandchildren, and that he gave up gardening and mowing the grass. Trial transcript (7/29/98) at 237-241, 270, 273. Because of his religious beliefs, Mr. Thacker is not "afraid" of getting lung cancer, but he is "concerned" about the possibility of developing that disease, not just for his own sake, but for that of his wife, children and grandchildren. *Id.* at 240, 241. The railroad's argument that Mr. Thacker should not be allowed to recover for his emotional distress because he described it as "concern" rather than "fear" has no merit.

Jethro Walker testified that he has shortness of breath, cannot work anymore, has trouble climbing stairs and sleeping, does not have much of a garden, worries about his health because of asbestos and his dust related lung disease, has discussed the risk of lung cancer with his family doctor, is bothered by the fact that a good friend who was exposed to asbestos as a welder died from lung cancer, does not fish any more and thinks about asbestosis and getting lung cancer because of his asbestos exposure. Trial transcript (7/29/98) at 286-88, 307, 317.

Homer Dye testified that he suffers from shortness of breath, that his lungs are getting worse, that he cannot do what he used to, that he cannot work around his house anymore (he used to clean gutters and paint), that he used to mow his yard in 30 minutes, but now it takes an hour or more, that he cannot climb hills anymore and has given up hunting and fishing, that he worries about getting cancer, and that he worries about how his elderly sister, who lives with him and suffers from cancer, will get along if he also develops cancer and is no longer able to care for her. Trial transcript (7/22/98) at 228-30, 235, 247.

E. Judgment

On March 8, 1999, after deducting offsets for settlements with Novamont and various manufacturers of asbestos products, the Circuit Court of Mingo County, West Virginia, entered judgment in favor of all plaintiffs. On or about March 22, 1999, the defendant, Norfolk Southern Railway Company, successor in interest to the Norfolk & Western Railway Company, filed a motion for judgment as a matter of law or in the alternative, for new trial or remittur. The lower court entered an order denying this motion on September 23, 1999. Unfortunately, Mellington Wheeler, who died of respiratory failure on September 10, 1999, did not live to see this order entered.

REASONS FOR DENYING THE WRIT

I. These Cases Provide A Poor Vehicle For Deciding The Issues Raised By Petitioner.

On each verdict form, the jury indicated that the negligence of the Norfolk and Western Railway Company had caused or contributed to a "work related dust disease," a finding amply supported by the evidence. The verdict forms used in these cases do not indicate the amount of damages, if any, awarded for fear of cancer or other emotional distress. The only question pertaining to damages on these forms asked the jury: "What amount do you find will reasonably compensate the plaintiff [NAME], for the loss he has suffered and will suffer in the future because of his work related lung injury?" *See* Respondents' Lodging at L-96. Under W. Va. R. Civ. P. 49, the jury could have been asked to award sums for each element of damages. The railroad, however, did not request a more detailed verdict form, or object to the form used. In fact, the parties agreed to the verdict form. Trial

Transcript (8/18/98) at 134, 72. Given these general verdicts, it is impossible to tell what amount of damages, if any, was awarded for emotional distress in general, or fear of cancer in particular. Consequently, these cases do not provide a good vehicle for deciding the fear of cancer issue raised by petitioner. In this regard, it should also be noted that the emotional distress claims presented by the plaintiff are much stronger than the petitioner makes them out to be.

The mixed dust pneumoconioses suffered by the plaintiffs are classic examples of "indivisible" injuries which cannot be rationally apportioned on the basis of causation. Moreover, even if the lower court had abandoned the doctrine of joint and several liability, there would have been little or no evidence to apportion damages on the basis of fault. Only two of the five plaintiffs had asbestos exposure at non-railroad jobs, and even in those cases, the railroad exposure was not "marginal" as alleged by the railroad. One of the plaintiffs with non-railroad asbestos exposure, Mellington Wheeler, settled with his non-railroad employer, Novamont, and the petitioner was given the benefit of an offset for that settlement. To have employed *both* a settlement offset and apportionment would have unduly reduced the petitioner's liability. Once again, these cases present a poor vehicle for deciding the issue presented.

II. The Alleged Conflict Of Authority Concerning Damages For Emotional Distress Is Based On Factually Distinguishable Cases, Most Of Which Predate This Court's *Gottshall* and *Metro-North* Decisions

The railroad asserts that there is a split of authority in the lower courts as to whether or not damages for emotional distress can be awarded in FELA cases absent some form of manifestation, presumably either physical symptoms or a medical diagnosis. On the "manifestation" side, it cites four FELA cases, two Jones Act cases and a state law tort action. On the other side it cites the Second Circuit's decision reversed by this Court in *Metro-North*.

In one of the "manifestation" cases referred to by the railroad, *Haggerty v. L&L Marine Serv., Inc.*, 788 F.2d 315, 317-18 (5th Cir.), *reh' g en banc denied*, 797 F.2d 256 (5th Cir. 1986), the Court actually rejected "physical manifestation" of emotional distress as a prerequisite to recovery. In another case cited by the railroad, *Bullard v. Central Vermont Railway, Inc.*, 565 F.2d 193 (1st Cir. 1977), the plaintiff hurt his foot in a train collision, but the emotional distress he sought to recover for did not involve any fear of future illness or injury resulting from the accident.

None of the other FELA or Jones Act "manifestation" cases cited by the railroad involve a plaintiff who had suffered a significant physical injury such as asbestosis. *See Martinez v. Bailey's Louisiana, Inc.*, 244 F.3d 477 (5th Cir. 2001) (sexual harassment case where plaintiff's counsel waived any claim of physical injury); *Moody v. Maine Central RR Co.*, 823 F.2d 693 (1st Cir. 1987) (railway employee failed to establish that employer's harassment

caused his angina attacks and general fatigue); *Alabama Great Southern RR Co. v. Jackson*, 587 So. 2d 959 (Ala. 1991) (supervisors hiding in locomotive bathroom at 2 a.m. frightened train crewman); *McMillan v. National Railroad Passenger Corp.*, 648 A.2d 428 (D.C. 1994) (decided under D.C. rather than federal law) (uninjured plaintiff failed to show more than a minimal or negligible threat of harm, so he was never in the zone of danger) (court states in dicta that emotional distress must be "serious and verifiable" but does not explain what proof is required). Consequently, these cases tell us nothing about whether the issuing courts would require some "manifestation" of emotional distress in FELA cases where, as here, the plaintiffs *have* been physically injured.

Moreover, the cases cited by the petitioner tell us virtually nothing about how the lower courts are interpreting this Court's holdings in *Gottshall* and *Metro-North* because most of them predate one or both of those decisions. Three of the FELA cases and one of the Jones Act cases cited by the railroad in favor of a manifestation requirement predate *both Gottshall* and *Metro-North*, while the fourth FELA case predates only *Metro-North*. The only FELA or Jones Act case cited by the railroad which was decided *after* both *Gottshall* and *Metro-North* is *Martinez v. Bailey's Louisiana, Inc.*, 244 F.3d 474 (5th Cir. 2001) in which the plaintiff "did not [even] plead negligent infliction of emotional distress" as a cause of action. *Id.* at 477 n.2. Moreover, Martinez's counsel waived any claim of physical injury, either as an event precipitating emotional distress or as a result of emotional distress. Consequently, the court acknowledged it did not have an opportunity to address the zone of danger rule adopted in *Gottshall*. *Id.*

III. The Alleged Conflict Of Authority Concerning Joint And Several Liability Is Not Based On Cases, Such As This One, Involving Multiple Tortfeasors Whose Combined Negligence Resulted In Indivisible Injuries

The railroad asserts that there is a split of authority concerning whether damages in FELA cases should be apportioned, with six cases from five courts approving apportionment and four cases rejecting it. This alleged conflict is more apparent than real. None of the purportedly "pro-apportionment" cases cited by the railroad involve the joint and several liability of multiple tortfeasors whose negligence was held to result in a single, "indivisible" injury. Instead, they involve pre-existing conditions and/or separate and discrete injuries, apparently none of which were found to result in "indivisible" injuries. *See Sauer v. Burlington Northern Railroad Co.*, 106 F.3d 1490 (10th Cir. 1997) (two separate railroad injuries to back and pre-existing conditions of degenerative changes of lumbar vertebrae and abnormal curvature of spine); *Varhol v. National Railroad Passenger Corp.*, 909 F.2d 1557 (7th Cir. 1990) (per curiam) (alleged aggravation of pre-existing MS by train derailment); *Akers v. Norfolk and Western Railway Co.*, 417 F.2d 632 (4th Cir. 1969) (upholding against railroad challenge a jury instruction stating that the railroad was not responsible for pre-existing conditions it neither caused nor aggravated); *Shupe v. New York Central System*, 339 F.2d 998 (7th Cir. 1965) (shoulder injury and back injury resulting from separate injuries on railroad); *Gustafson v. Burlington Northern Railroad Co.*, 561 N.W.2d 212 (Neb. 1997) (given general verdict for plaintiff, trial court did not commit reversible error in giving instruction on aggravation of pre-existing injury that failed to say that if the jury could not

determine how much of the plaintiff's current condition was due to aggravation, it should award damages for the entire condition); *Dale v. B&O*, 552 A.2d 1037 (Pa. 1989) (disability resulting from lifelong asthma and occupational asbestosis) (court did not determine "whether the evidence permits apportioning damages, or whether apportionment would be mere speculation, and whether plaintiff or defendant has the burden of proving the proportion of damages allegedly caused by B&O . . .")[2] None of the "pro-apportionment" cases cited by the railroad even discuss the joint and several liability of multiple tortfeasors for indivisible injuries, let alone say they are abandoning this rule. The failure of the petitioner to cite a single case rejecting joint and several liability in multiple tortfeasor situations is striking.

IV. Petitioner Exaggerates The Impact Of The Lower Court's Ruling And The Importance Of West Virginia As A Forum

Contrary to the railroad's assertions, West Virginia is not "the venue in which virtually all" asbestos-related litigation against Norfolk Southern and CSX is brought.[3] Nor is it likely

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2. The current status of the *Dale v. B&O* holding is unclear because of a recent decision by an intermediate appellate court in Pennsylvania holding that Conrail was responsible for the entire amount of damages for the plaintiff's carpal tunnel syndrome, although the railroad presented evidence that other activities, such as push-ups, could have been a contributing factor. *McDermott v. Consolidated Rail Corp.*, 768 A.2d 348, 352-53 (Pa. Super. Ct. 2001).

3. The railroad relies on certain materials contained in its lodging that were not part of the record below. Respondents believe this lodging should be stricken. Should the Court find it appropriate to review petitioners' lodging, however, they ask the court to review respondents' lodging as well.

that the lower court's ruling on fear of cancer claims and joint and several liability "will control the asbestos-related liability of the two major eastern railroads, Norfolk Southern and CSX. . . ." This is far too much influence to attribute to a single order penned by a single judge sitting in a single trial court in one of the many states in which the petitioner operates. In fact, there is no way that the ruling of the lower court, standing by itself, could possibly control the outcome in all of the petitioner's other asbestos cases, unless one believes that all of the existing litigation in other courts, and all those cases that might be brought in the future, could somehow be transferred to, or filed in, the Circuit Court of Mingo County, West Virginia, and that Judge Thornsbury, the only judge sitting in that circuit, inundated by a flood of non-resident claims, would deny any forum *non conveniens* motion presented by the railroad. Of course, that is not going to happen.

In an effort to magnify the importance of the lower court's ruling, the railroad asserts that "[t]he West Virginia Supreme Court has made it clear that it will not grant a petition for appeal in these types of cases." Its petition does not explain what constitutes "these types of cases" or how the Court "makes it clear" that it would not review such cases on appeal.[4] If the railroad is talking about FELA cases in

4. Although there is no appeal of right in civil cases, the Supreme Court of Appeals of West Virginia accepts a high percentage of petitions for appeal. Under its original jurisdiction, the Court also rules on many issues raised by extraordinary writs such as mandamus and prohibition. In 1999, the most recent year for which statistics are available, the Court granted 40.5% of the 3,090 petitions for appeal and extraordinary writ it considered. 1999 Statistical Report, Supreme Court of Appeals of West Virginia. More

(Cont'd)

general, then its assertion is certainly incorrect, because that court has frequently resolved appeals and writs arising from FELA litigation and in many cases has ruled in favor of the railroad.[5] If the railroad is talking about "asbestos" cases, the assertion is also incorrect, because that court has reviewed asbestos litigation on many occasions.[6]

As noted below, the lower court's rulings on fear of cancer claims and joint and several liability are consistent with the position taken on those issues by numerous courts in other jurisdictions. Moreover, in choosing a venue in which to file suit, plaintiffs' counsel have many factors to

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(Cont'd)
specifically, it granted 30% of the 456 petitions for appeal it considered in civil cases. *Id.* To put these figures in perspective, "[o]n average, all state courts of last resort granted only 10 percent of discretionary petitions considered in 1997." *Id.*

5. *See, e.g., Finley v. Norfolk and Western Railway Co.*, 540 S.E.2d 144 (W. Va. 1999) (per curiam) (upholding on appeal a lower court ruling that denied the plaintiff's motion for new trial); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473 (W. Va. 1997) (upholding on appeal a summary judgment and directed verdict in favor of the railroad); *Norfolk and Western Railway Co. v. Tsapis*, 400 S.E.2d 239 (W. Va. 1990) (writ of prohibition) (holding that doctrine of forum *non conveniens* applies in FELA cases).

6. *See, e.g., Marlin v. Bill Rich Const., Inc.*, 482 S.2d 620 (W. Va. 1996); *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300 (W. Va. 1996); *In Re State Public Bldg. Asbestos Litigation*, 454 S.E.2d 413 (W. Va. 1994); *Abbott v. Owens-Corning Fiberglas Corp.*, 444 S.E.2d 285 (W. Va. 1994); *State ex rel. CCR Ltd. v. MacQueen*, 441 S.E.2d 658 (W. Va. 1994); *Davis v. Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992); *State ex rel. H.K. Porter Co. v. White*, 386 S.E.2d 25 (W. Va. 1989).

consider in addition to how the forum court has ruled, or may rule, on those two particular issues. For example, counsel must consider how congested the court system is, what kind of jury may be empaneled, how convenient the forum will be to an often elderly or infirm client who finds it difficult to travel, how accessible witnesses will be, the procedural and evidentiary rules of the forum, and the possibility that the chosen forum may dismiss a non-resident's claim on forum *non conveniens* grounds. Indeed, West Virginia's courts have frequently dismissed FELA cases pursuant to such motions, as evidenced by respondents' lodging, which includes 15 dismissal orders. In addition, many law firms based in West Virginia, including respondent's counsel, have frequently filed FELA cases in other states such as Virginia, Kentucky and Ohio, and many firms based in surrounding states have never filed a single FELA case in West Virginia.

The cases at bar certainly do not illustrate the problem alleged by Petitioner, because they do not involve a mass filing by non-resident plaintiffs seeking a more friendly forum than their home states. These five consolidated cases were tried in Williamson, West Virginia, and all of the plaintiffs had strong connections with the forum state. The lead plaintiff, Homer Dye, was born in Williamson, West Virginia and has lived there all his life. He worked for the Norfolk and Western for forty-three years and seven months, all but three months of which he worked out of the Williamson, West Virginia yard (the remaining three months were at Matewan, West Virginia). Mellington Wheeler was born in Milton, West Virginia and lived in Ceredo, West Virginia at the time of trial. He worked for the Norfolk and Western from 1955 to 1961 as a fireman and engineer at the Kenova, West Virginia yard. Jack Lambert had lived for

nineteen years at Delbarton, West Virginia when these cases went to trial. Before that, he lived at Thacker, West Virginia. He worked for the railroad at various locations in West Virginia, including Thacker, McCarr, Matewan, Panther and Williamson. Jethro Walker was a lifetime resident of Ode, West Virginia, who hired in with the railroad at Besoco, West Virginia, and worked on the New River Division, which included much of Southern West Virginia. Leo Thacker was living in Rome, Ohio, at the time of trial, but he was born in Huntington, West Virginia and grew up in Wayne County, West Virginia. As a maintenance of way laborer, he worked on a number of sections, including one that extended from Portsmouth, Ohio to Norfolk, Virginia. At least part of his work for the railroad and resulting asbestos exposure was in Williamson, West Virginia, where he worked on track near the roundhouse.

In its petition, the railroad notes that there were approximately 2,500 asbestos-related railroad cases filed in West Virginia according to an administrative order filed by the Supreme Court of Appeals on December 28, 2000. The petition does not indicate, however, how many of those 2,500 plaintiffs were West Virginia residents, nor how many of the non-resident plaintiffs had worked for the railroad in West Virginia. Nor does it give the reader any basis for comparing this figure to the asbestos-related caseload in other states. Because railroads have historically been a major employer in many West Virginia counties, it should come as no surprise that this state has a significant FELA caseload. In fact, the C&O, a predecessor to CSX, maintained what was widely acclaimed as the largest steam locomotive repair facility in the world at Huntington, West Virginia. The Norfolk and Western Railway Company and the Virginian Railway, predecessors in interest to today's

Norfolk Southern Railway Company, also maintained track and facilities in a host of West Virginia communities, including Bluefield, Logan and Williamson.

The railroad cites four mass filings of FELA claims in the Northern Panhandle of West Virginia by a law firm from Pittsburgh, Pennsylvania. Although the railroad notes that many of these plaintiffs were non-residents, it does not indicate how many of the non-residents worked for the railroad in West Virginia at some point in time, or whether any forum *non conveniens* motions were filed. Without this information, the significance, if any, of the mass filings is at best unclear.

V. The Rulings Of The Lower Court Were Correct

A. Emotional Distress

Because all respondents suffered significant injuries from their occupational exposure to asbestos and silica, two widely recognized human lung carcinogens, the trial court properly instructed the jury that it could award damages for emotional distress, including fear of cancer. Its ruling was consistent with this Court's *Metro-North* decision, which held that a person exposed to a toxic substance such as asbestos cannot recover damages for fear of cancer unless and until he "manifests symptoms of a disease." 521 U.S. at 427. In this case, all respondents have been diagnosed with a mixed dust pneumoconiosis, including asbestosis and silicosis, thus meeting that requirement. This Court has never required a plaintiff who currently suffers from a compensable injury or illness to also establish a physical manifestation of his emotional distress, nor should it, although invited to do so in both *Gottshall* and *Metro-North*. In fact, in *Metro-*

North, this Court recognized that "[c]ommon law courts do permit a plaintiff who suffers from a disease to recover for related negligently caused emotional distress . . .", 521 U.S. at 432, and that "[t]he law, . . . does permit recovery for emotional distress where that distress accompanies a physical injury, . . ." *Id.* at 429-30. It also distinguished *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc.2d 11, 507 N.E.2d 476, 480-81 (1987), which allowed the recovery of damages for fear of cancer, as a case involving an "asbestosis-afflicted plaintiff" who "fell within a category where the law already permitted recovery for emotional distress." 521 U.S. at 437.

In its decisions concerning emotional distress damages in FELA cases, this Court has looked for guidance to the common law. Historically, plaintiffs who suffered a physical injury or illness have been allowed to recover damages for emotional distress related to their injuries or the conduct which caused them. *See* Restatement (Second) of Torts § 456 (1965) ("Emotional Disturbance Resulting From An Actionable Injury Or The Conduct Which Caused It").

Many state and local courts have allowed fear of cancer claims in cases involving asbestosis or asbestos related pleural disease without requiring any physical manifestation of emotional distress. *See, e.g.*, *Dunn v. HOVIC*, 1 F.3d 1362, 1367 (3d Cir. 1993); *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 83-85 (3d Cir. 1986); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 413-14 (5th Cir. 1986) (en banc); *Griffin v. Keene Corp.*, No. 85 C 10748, 1990 WL 93292 (N.D. Ill. June 19, 1990); *Mauro v. Owens Corning Fiberglas Corp.*, 542 A.3d 16 (N.J. Super. 1988); *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc.2d 11, 507 N.E.2d 476 (C.P. 1987); *Eagle-Picher Industries, Inc. v. Cox*, 481

So. 2d 517, 526-29 (Fla. Dist. Ct. App. 1985); *Denton v. Southern Railway Co.*, 845 S.W.2d 885, 888-89 (Tenn. Ct. App. 1993) (FELA).

Allowing railway employees who suffer from asbestosis or related diseases to recover damages for a reasonable fear of developing cancer does not "open the floodgates," a concern expressed in this Court's earlier emotional distress cases. Accordingly, such claims are permitted under FELA in keeping with its remedial and humanitarian purposes.

B. Joint And Several Liability

Given the indivisible nature of the lung diseases of Respondents Wheeler and Thacker (the only cases arguably involving non-railroad exposure), the lower court did not err in applying joint and several liability, even though there may have been asbestos exposure at other job sites. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094-96 (5th Cir. 1973) (asbestosis is an indivisible injury); Restatement (Second) of Torts § 433A, comment i (1965) (damages for most personal injuries cannot be apportioned), Trial transcript (7/24/98) at 49 (testimony by Dr. Gaziano that one has to consider the cumulative effect with dust diseases because all exposures contribute to the disease).

FELA provides that a carrier is responsible for any injury caused, in whole or in part, by its negligence. 45 U.S.C. § 51. FELA provides no grounds for diminishing that responsibility other than the contributory negligence, if any, of the employee. *See* 45 U.S.C. § 53. This statutory language is reinforced by the common law.

At common law, multiple tortfeasors whose negligence combined to cause a single, indivisible injury were jointly and severally liable for the plaintiff's loss. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n.8 (1979); Restatement (Second) of Torts §§ 875, 879 (1977); Restatement of Torts §§ 875, 879 (1939); Dan B. Dobbs, *The Law Of Torts* § 390 at 1091 (2000). It was the function of the judge, rather than the jury, to determine whether an injury was divisible or indivisible. Restatement (Second) of Torts § 434 (1965). If a party believed that apportionment of damages was appropriate, it had the burden of proving what portion of the damages it should be responsible for. Restatement (Second) of Torts § 433 B (2) (1965). When Congress enacted FELA, it did not abolish the common law doctrine of joint and several liability. Over the many years since FELA was passed, state and federal courts have frequently recognized that multiple tortfeasors who cause an indivisible injury are jointly and severally liable to the plaintiff.[7] Congress, which must have been aware of these decisions, has never seen fit to amend FELA to provide for some form of proportionate liability of joint tortfeasors. Given the delicate balance of statutory compensation schemes such as FELA, and the variety of apportionment

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7. *See, e.g., Lockhard v. Missouri Pacific RR*, 894 F.2d 299, 305 (8th Cir. 1990); *Stephens v. Southern Pacific Transportation Co.*, 991 F. Supp. 618, 620 (S.D. Tex. 1998); *Rice v. Cincinnati, New Orleans & Pacific Railway Co.*, 920 F. Supp. 732, 735 (E.D. Ky. 1996); *Mazyck v. Long Island Railroad Co.*, 896 F. Supp. 1330, 1332-333 (E.D.N.Y. 1995); Syllabus Point 1, *Gaulden v. Burlington Northern, Inc.*, 654 P.2d 383 (Kan. 1982); *Narcise v. Illinois Central Gulf Railroad Co.*, 427 So. 2d 1192, 1195 (La. 1983); *Lewis v. National Railroad Passenger Corp.*, 176 Misc.2d 947, 675 N.Y.S.2d 504 (1998); *Denton v. Southern Railway Co.*, 854 S.W.2d 885, 888 (Tenn. Ct. App. 1993).

mechanisms that might be substituted for traditional joint and several liability, any change to the apportionment rules under FELA should come from Congress, rather than the courts.

Contrary to the railroad's assertions, joint and several liability is not an anachronism, but a widely applied doctrine of continuing vitality, not just here but abroad. It is applied not only in FELA cases but in Jones Act cases,[8] general maritime personal injury cases, *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995), Longshoremen's and Harbor Workers' Compensation (LHWC) cases, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), Death on the High Seas Act (DOHSA) cases, *In Re Ocean Foods Boat Co.*, 692 F. Supp. 1253, 1264 (D. Ore. 1988), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) cases[9] and Federal Water Pollution Control Act (FWPCA) cases. *United States v. M/V Big Sam*, 681 F.2d 432, 439 (5th Cir. 1982). In addition, "joint and several liability with

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8. *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1430-32 (5th Cir. 1988); *Joia v. Jo-Ja Serv. Corp.*, 817 F.2d 908, 917 (1st Cir. 1987); *Dicola v. American Steamship Owners Mut. Protection & Indemn. Assn. (In Re Prudential Lines, Inc.)*, 170 B.R. 222, 235 (S.D.N.Y. 1995); *Johnson v. National Steel & Shipbuilding Co.*, 742 F. Supp. 1062, 1065 (S.D. Cal. 1990); *Texaco v. Addison*, 613 So. 2d 1193, 1202 (Miss. 1993).

9. *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *Ohm Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1579 (5th Cir. 1997); *Rumpke of Indiana v. Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996); *Price v. U.S. Navy*, 39 F.3d 1011 (9th Cir. 1994); *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993); *O'Neill v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160, 171-73 (4th Cir. 1988).

contribution has long been the rule in England and almost all other countries, most of which have comparative responsibility liability regimes." Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U. Cal. Davis L. Rev. 1141, 1185 (1988).

As recently as twenty-five years ago, joint and several liability was the rule in every state in the country. *Coats v. Penrod Drilling Corp.*, 61 F.3d at 1130-31. In the name of "tort reform," a number of states have since abandoned or modified traditional joint and several liability, but fifteen states (one more than the number of states using the zone of danger test when *Gottshall* was decided) still retain pure joint and several liability, while twenty other states retain it in a modified or limited form. Restatement (Third) of Torts: Apportionment of Liability § 17, reporter's note at 149 (2000). For example, some states apply joint and several liability when the plaintiff is free of negligence (under which approach respondents would be able to recover), or apply joint and several liability only in certain kinds of cases.[10]

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10. Significantly, some states have enacted legislation expressly retaining joint and several liability in cases involving toxic substances such as asbestos. *See* Haw. Rev. Stat. § 663-10.9(2)(c); *In Re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 818-19 (9th Cir. 1992); Ill. Comp. Stat. § 5/2-1118; *Padgett v. A&M Insulation Co.*, 640 N.E.2d 21, 23-4 (Ill. Ct. App. 1994); N.J. Stat. Ann. § 2A: 115-5.3(d)(1) & (f); *Stevenson v. Keene Corp.*, 603 A.2d 521 (N.J. Super. Ct. 1992), *aff'd, per curiam*, 620 A.2d 1047 (N.J. 1993); Tex. Civ. Prac. & Rem. Code Ann. § 33.013(c)(2); *McNair v. Owens-Corning Fiberglas Corp.*, 890 F.2d 753 (5th Cir. 1989); Wash. Rev. Code § 4.22.070(3)(a); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 728 (Wash. 1989).

Regardless of what rules the state legislatures may choose to apply in tort cases, however, this court must be guided by the intent of Congress when it enacted FELA to shift the cost of industrial injuries and deaths to employers. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 431-32 (1958). Abandoning the rule of joint and several liability in cases where the negligence of multiple tortfeasors results in an indivisible injury would be inconsistent with that goal. Under joint and several liability, the defendant bears the burden of locating and suing other potentially responsible tortfeasors and the risk that some or all of them may be dissolved, insolvent, immune from suit or simply not worth pursuing. Under the rule of several liability advocated by the petitioner, the injured party, even if wholly free of any contributory negligence, would bear those risks and burdens.

CONCLUSION

The Norfolk Southern's petition for certiorari should be denied.

Respectfully Submitted,

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APPENDIX

APPENDIX — ADDITIONAL RELEVANT DOCUMENTS

[Omitted here but submitted separately as Lodging]